IN THE

Supreme Court of the United States

October Term, 1955

No. 158

FROZEN FOOD EXPRESS, *Appellant*,

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION

No. 159

INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

FROZEN FOOD EXPRESS, et al.

No. 160

AMERICAN TRUCKING ASSOCIATIONS, INC., et al., *Appellants*,

v.

FROZEN FOOD EXPRESS, et al.

No. 161

AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY, et al., *Appellants*,

v.

FROZEN FOOD EXPRESS, et al.

No. 162

EAST TEXAS MOTOR FREIGHT LINES, INC., et al., *Appellants*,

v.

FROZEN FOOD EXPRESS, SECRETARY OF AGRICULTURE OF THE UNITED STATES, et al.

No. 163

INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

FROZEN FOOD EXPRESS, et al.

No. 164

AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY, et al., *Appellants*,

v.

FROZEN FOOD EXPRESS, et al.

BRIEF OF THE APPELLANT RAILROADS

JAMES W. NESBIT,
CHARLES P. REYNOLDS,
CARL HELMETAG, JR.,
1740 Suburban Station Building,
Philadelphia 4, Pa.,
Attorneys for Appellant Railroads.

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BRIEF OF THE APPELLANT RAILROADS

I

THE CASE BELOW

The case below from which these appeals have been taken is *Frozen Food Express v. United States*, 128 F. Supp. 374 (S. D. Tex. 1955). This case involved two companion civil actions, namely Civil Action No. 8285 and Civil Action No. 8396. These actions were argued together and reported in a single opinion. The Court below consisted of the Honorable Joseph C. Hutcheson, Jr., Chief Circuit

Judge; the Honorable Ben C. Connally, District Judge; and the Honorable J. W. Kennerly, District Judge, concurring in part and dissenting in part. For the convenience of this Court a copy of the opinion is included in the record at pages 104 to 113 inclusive (Nos. 158-161).

II

THE JURISDICTION OF THE SUPREME COURT

The proceedings below were instituted to enjoin and set aside certain orders of the Interstate Commerce Commission, hereinafter sometimes referred to as the "Commission", issued respectively in *Determination of Exempted Agricultural Commodities*, I. C. C. Docket No. MC-C-968, 52 M. C. C. 511 (1951), hereinafter sometimes referred to as the *Determination* case, and *East Texas Motor Freight Lines Inc. v. Frozen Food Express*, I. C. C. Docket No. MC-C-1605, 62 M. C. C. 646 (1954), hereinafter sometimes referred to as the *Enforcement* case. Such proceedings below were instituted pursuant to the requirements of 5 U. S. C. § 1009, 28 U. S. C. §§ 1336, 1398, 2321-2325 and 49 U. S. C. § 305(g). The causes were heard by the three-judge Court below in accordance with the requirements of 28 U. S. C. § 2325.

The Court below held in Civil Action No. 8285 that the rulings of the Commission in the *Determination* case did not constitute an order subject to judicial review and denied relief to the plaintiff and the intervening plaintiff by dismissing their complaints in a judgment entered on February 23, 1955.

Notices of Appeal from this judgment were filed on or about April 19, 1955 by Frozen Food Express (No. 158), the Interstate Commerce Commission (No. 159), American Trucking Associations, Inc. (No. 160), and by these Appellant Railroads (No. 161). Jurisdictional statements were filed on or about June 17, 1955 by all of these several appellants.

The jurisdiction to review the judgment of the three-judge Court below is by statute. 28 U. S. C. §§ 1253 and 2101(b). The jurisdiction of this Court to review the judgment of the Court below by a direct appeal is also supported by numerous cases such as *United States v. B. & O. R. Co.*, 333 U. S. 169 (1948) and *I. C. C. v. Hoboken R. Co.*, 320 U. S. 368 (1943). That the rulings of the Commission in the *Determination* case are reviewable by this Court is established by *Columbia Broadcasting System v. United States*, 316 U. S. 407 (1942), and *American Trucking Associations Inc. v. United States*, 344 U. S. 298 (1953) and by the fact that they constitute an exercise of the Commission's rule-making powers within the meaning of sections 2(c)2 and 10(c) of The Administrative Procedure Act, 5 U. S. C. §§ 1001(c), 1009(c). Furthermore, these Appellant Railroads are not precluded from seeking review in this Court by any contention that the action of the Court below in dismissing the complaint was a favorable decision. Rather, the decision of the Court below which denies the Railroads the relief sought, namely a review on the merits of the Commission's rulings was, under the doctrine of a long line of cases beginning with *Corning v. Troy Iron and Nail Factory*, 56 U. S. 451 (1853), an unfavorable decision from which an appeal to this Court is proper.

The Court below in the companion case, Civil Action 8396, enjoined and restrained the Commission from enforcing its order in *East Texas Motor Freight Lines Inc. v. Frozen Food Express*, Docket MC-C-1605, 62 M. C. C. 646 (1954), insofar as the order of the Commission interferes with or restrains the transportation by Frozen Food Express of fresh or frozen dressed poultry without a certificate or permit duly issued pursuant to section 207(a) or section 209(b) of the Interstate Commerce Act (49 U. S. C. §§ 307(a), 309(b)). In so doing the Court below was enjoining and restraining the Commission from enforcing its ruling made in the *Determination* case respecting the status of fresh or frozen dressed poultry.

Notices of appeal from this decision of the Court below were filed on or about April 19, 1955 by East Texas Motor Freight Lines Inc. (No. 162), the Interstate Commerce Commission (No. 163), and by these Appellant Railroads (No. 164).

Jurisdiction of this Court to review this decision of the three judge Court below is established by statute. 28 U. S. C. §§ 1253 and 2101(b) and by such cases as *United States v. B. & O. R. Co., supra*, and *Interstate Commerce Commission v. Hoboken R. Co., supra.*

The time for filing motions to affirm was extended until August 16, 1955 by an order of this Court signed by Mr. Justice Black and, within the time so extended, the United States of America and the Honorable Ezra Taft Benson, Secretary of Agriculture, moved that the judgment of the Court below in Civil Action 8396 be affirmed. Briefs in opposition to this motion were filed on behalf of American Trucking Associations Inc., the Interstate Commerce Commission and these Appellant Railroads.

On October 10, 1955 this Court entered an order noting probable jurisdiction in all of the several appeals, Nos. 158 to 164 inclusive, October Term, 1955 and consolidated the appeals for oral argument.

III

THE STATUTES AND INTERSTATE COMMERCE COMMISSION ACTIONS INVOLVED

The statute primarily involved in the matters before this Court is section 203(b)(6) of the Interstate Commerce Act (49 U. S. C. § 303(b)(6)) which reads as follows:

> "(b) Nothing in this Chapter, [i.e. referring to the economic regulatory powers of the Act governing the operations of motor common and contract carriers including such things as certificates, rates, etc.] • • • shall be construed to include • • • (6) motor vehicles used in carrying property consisting of • • • agricul-

tural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property * * * for compensation."

This section of the Act is commonly referred to as the "agricultural exemption" and will be referred to as such in this brief. To a perhaps somewhat lesser extent sections 2(c), 4 and 10 of the Administrative Procedure Act (5 U. S. C. §§ 1001(c), 1003 and 1009) are also involved. It is not deemed necessary at this point to quote such sections, but, for the convenience of the Court, they are set forth in full in Appendix A attached hereto.

Involved in, and indeed the basis of, this litigation is the report and order of the Commission in *Determination of Exempted Agricultural Commodities,* 52 M. C. C. 511 (1951), and the report and order of the Commission in *East Texas Motor Freight Lines, Inc. v. Frozen Food Express,* 62 M. C. C. 646 (1954). The report and order in the *Determination* case is found at pages 30-102 of the printed record in Nos. 158-161 and the report and order in the *Enforcement* case is found at pages 6-16 of the printed record in Nos. 162-164.

IV

THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Court below err in holding that the Report and Order of the Interstate Commerce Commission in *Determination of Exempted Agricultural Commodities,* 52 M. C. C. 511 (1951), was not subject to judicial review, when in that proceeding the Commission, after extensive hearings and the most mature and careful consideration in an effort to end confusion existing in the transportation industry and at the same time to bring about orderly regulation for the future, determined which of several commodities could be transported within the exemption of section

203(b)(6) of the Interstate Commerce Act, and which commodities could be transported only in compliance with the regulatory provisions of the Act?

In this Brief the affirmative of this question is argued.

2. Did the Court below err in enjoining and restraining the Interstate Commerce Commission from enforcing its order prohibiting a motor carrier from transporting fresh or frozen dressed poultry without authority from the Commission on the grounds that such poultry is within the exemption of section 203(b)(6) of the Interstate Commerce Act.

In this Brief the affirmative of this question also is argued.

V

THE STATEMENT OF THE CASE

A. The Background That Led to the Institution of the Determination Case Before the Commission

It is the view of these Appellant Railroads that this Court has before it the reviewability of Interstate Commerce Commission formalized action which in every sense constitutes an exercise of its "rule-making" power as that term is used in the Administrative Procedure Act. In addition, this Court is being asked to review on the merits an attempt by the Commission to enforce certain of the rules formulated in the *Determination* case and attacked in the *Enforcement* case.

To understand properly the nature of the Commission's action, and to appraise and evaluate the soundness and legality of the Commission's determinations, it is necessary to have in mind the circumstances which prompted the Commission to act in the way that it did. A brief sketch of the background that preceded this litigation will provide a suitable climate for judging the legal aspects and consequences of the Commission's activity and will, it is believed, simplify and clarify the issues.

At the time the Committees of Congress had under consideration the regulation of the interstate motor carriers, the nation was in the throes of a most severe economic depression which had visited an extremely serious financial crisis upon all forms of for-hire transportation both of the regulated variety, which at that time included only the railroads, and the unregulated, which included, among other forms of transportation, the interstate truckers. A vast over-supply of transportation facilities and a corresponding under-supply of freight traffic had created unsound economic conditions for the carriers and was threatening their continued ability adequately to move the nation's commerce. The ease with which new motor carriers could enter the field was worsening an already bad situation.

In an attempt to cope with the rapidly growing oversupply of transportation, Congress passed the Motor Carrier Act of 1935 (49 Stat. 543) which became Part II of the Interstate Commerce Act. The keystone in this Act are the provisions of sections 207(a) and 209(b) which confer upon the Commission the power to control the supply of motor carrier transportation by limiting the entry of new carriers into the field.[1] While it was intended that the Commission should have a plenitude of power over all types of interstate for-hire motor transportation, it was recognized that there were many such operations which, although in interstate commerce from a legal standpoint were, from a practical viewpoint, essentially of a local nature. To avoid excessively burdening the Commission and to avoid the impact on certain types of carriers of federal regulation aimed at transportation agencies that were truly competitive with the long haul operations of existing carriers, Congress included section 203(b) in the Act. This section exempts from the economic regulatory powers of the Commission specific types of interstate motor carrier operations. A

1. See Hearings on H. R. 5262, 74th Cong., 1st Sess., p. 27, Hearings on S. 1629, 74th Cong., 1st Sess., pp. 51, 78.

glance at this section indicates the type of operations that are exempted. For example, they include taxi service, school buses, vehicles operated by country hotels to bring passengers from depots, vehicles operated in national parks, vehicles used in distributing newspapers, and vehicles operating within municipalities. And, from the standpoint of this case, most important of all, vehicles used in transporting "agricultural commodities (not including manufactured products thereof)".

It is evident from the very language of the agricultural exemption that it would be necessary to make judgment determinations to ascertain whether particular commodities that have a farm origin, but which have been subjected to some processing, remain "agricultural products" and, therefore, can be transported outside of regulation, or have become "manufactured products thereof" which can only be transported by carriers that have certificates or permits from the Commission. Further, it is evident that with respect to a vast number of farm-origin commodities that have received some processing, the determination of whether they are exempt or non-exempt would be a difficult one to make because nowhere in the statute did Congress see fit to set forth the criteria to be applied in allocating a particular commodity into the exempt, or non-exempt, classification. This being so, it is apparent that Congress intended that the Commission to which it, over the years has given extensive powers to regulate the nation's surface transportation agencies, should, on the basis of the overall objectives of the Interstate Commerce Act, implement the general language of the exemption by pronouncements of policies which would give such language detailed meaning. Stated a little differently, it is evident from the language of the exemption that Congress intended that the Commission should supplement the broad language of the exemption by a detailed formula which would give it everyday workability. The legislative history bears this out. 79 Cong. Rec. 12205, 12207.

While it seems clear and beyond dispute that Congress intended the Commission should have wide latitude and broad powers to determine whether specific items were included in the exempt category of agricultural products or were to fall in the non-exempt category of manufactured products thereof, the task of making the allocation was not one easy of accomplishment.

With the tremendous technological development of long-haul highway transportation in the late thirties and early forties, the movement of farm origin commodities both of the processed and non-processed types over great distances by for-hire motor carriers greatly increased and, with this situation, problems arose which were of important concern to the entire transportation industry.

Numerous for-hire carriers either unable to meet the requirements for certificates of convenience and necessity, or desirous of doing a non-regulated business claimed that the hauling of processed agricultural products was covered by the agricultural exemption. Other carriers, acting on advice of the Commission's Bureau of Motor Carriers, sought and acquired certificates covering transportation activities which others were carrying on outside of regulation under the assumed protection of the agricultural exemption. Attempts by the Commission and those in the Commission's Bureau to determine on a piecemeal basis whether a particular commodity that originated on the farm, but which had been subjected to processing that to some degree changed its characteristics, was covered by the agricultural exemption, only added to the uncertainty and confusion that existed among those in the transportation industry. See the report of the Commission in the *Determination* case, *supra*, and the opinion of the lower Court in *I. C. C. v. Allen E. Kroblin, Inc.*, 113 F. Supp. 599 (N. D. Iowa 1953), aff'd 212 F. 2d 555 (8th Cir. 1954), cert. denied, 348 U. S. 836 (1955).

After World War II was over and conditions had returned to the relative normalcy of peace, the Commission, in

the later part of 1949, responded to petitions of the Department of Agriculture and to numerous requests for rulings interpreting the agricultural exemption by instituting a formal, broad, sweeping investigation for the purpose of determining the status of a vast number of processed commodities that originated in the agricultural community. This proceeding, as indicated before, was docketed as *Determination of Exempted Agricultural Commodities*, Docket MC-C 968, 52 M. C. C. 511 (1951).

B. The Determination Case Before the Commission

The *Determination* case is characterized by the Commission as an "investigation instituted on our own motion into and concerning the meaning of the 'term Agricultural Commodities (not including manufactured products thereof)' as used in section 203(b)(6) of the Act." The institution of this investigation was well known throughout the transportation industry both by the Commission's usual notices to the public and the press, by publication in the Federal Register (R. 29, Nos. 158-161) and by publicity given to this proceeding in trade journals and by the many transportation associations to their individual members. Hearing was held before one of the Commssion's examiners at which all interested parties were given an opportunity to be heard. Many interested groups utilized this opportunity to present their views as to how the agricultural exemption should be interpreted and as to what commodities should be in the exempt or the non-exempt groups. Thereafter the Examiner issued a recommended report to which exceptions were taken by some parties. Other parties supported the Examiner's recommendations by replying to the exceptions. The Commission heard oral arguments and, on April 13, 1951, issued a report and order which these Appellant Railroads believe constitutes a completely lawful and entirely proper exercise of the Commission's power to prescribe and make effective interpretative rules.

Briefly, in the report and order, the Commission first defined the term "Agricultural Commodities" (R. 41, Nos. 158-161), and followed this with a definition of the term "Manufactured Products Thereof" (R. 44, Nos. 158-161). Having decided how the broad terms used by Congress should be defined, the Commission then went on and classified a long list of commodities as being either exempt or non-exempt (R. 89, Nos. 158-161). Since the Commission had made final determinations and had decided that further hearings were not necessary, although there had been requests for such further hearings, it was appropriate for the Commission to bring the investigation to a close. This was done in the usual manner by discontinuing the proceedings (R. 90, Nos. 158-161). That the Commission's proceedings in the *Determination* case constituted an exercise of the Commission's rule-making powers as such terms are used in the Administrative Procedure Act, and that the Commission's order as formulated had all of the finality and future effectiveness that was within the Commission's power to give to it, is, these Appellant Railroads believe, made evident by the Commission's report itself and by the litigation that followed the *Determination* case. It is significant to note at this point that no party in the instant litigation has complained, or is now complaining, that the proceedings before the Commission from a procedural standpoint were inadequate, unfair, or unlawful. In view of the fact that the proceedings more than complied with the standards of the Administrative Procedure Act, it would be surprising indeed if such a contention had been made.

C. The Litigation Before the Commission Subsequent to the Determination Case

In an attempt to test the validity of the Commission's rules in the *Determination* case and to prevent a competitor from carrying on operations in violation of the

rules, East Texas Motor Freight Lines and other certificated motor carriers, on December 23, 1953, filed a complaint with the Commission asking it to order Frozen Food Express to cease and desist from hauling, without a certificate of convenience and necessity, fresh or frozen meat, meat products and dressed poultry, which the Commission in the *Determination* case had held were in the non-exempt category. This matter was docketed by the Commission as *East Texas Motor Freight Lines Inc. v. Frozen Food Express,* Docket MC-C-1605, and reported at 62 M. C. C. 646 (1954). In the proceedings before the Commission it was stipulated that Frozen Food Express was engaged in the hauling of such commodities without a certificate, whereupon the Commission, in an appropriate adjudication which is not complained of as being inadequate from the procedural standpoint, issued a cease and desist order based on the rulings made in the *Determination* case. It is this order (R. 15-16, Nos. 162-164) which provided the immediate basis for the litigation below. It is significant to note that other attempts have been made to make effective the Commission's rulings in the *Determination* case by subsequent litigation.[2]

D. The Litigation in the Court Below

Frozen Food Express, aggrieved by the Commission's cease and desist order which compelled it to refrain from operations it had conducted formerly, filed suit in the District Court of the United States for the Southern District of Texas, Houston Division, to enjoin the Commission from enforcing its order. The Secretary of Agriculture, The Honorable Ezra Taft Benson, intervened in support of Frozen Food Express, and the American Trucking Associations, Inc., several motor carriers, and these Appellant Railroads intervened in support of the Commission. The matter was docketed by the Court below as *Frozen Food Express v. United States,* Civil Action No. 8396.

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2. *I. C. C. v. Allen E. Kroblin, supra.*

In a separate suit filed at about the same time Frozen Food Express asked the Court below to enjoin and restrain the Commission and the United States Government from enforcing or recognizing the validity of the Commission's order in the *Determination* case alleging, *inter alia*, that the Commission's action in that matter was arbitrary, unreasonable and capricious. The Secretary of Agriculture joined in this second suit to the extent that certain commodities were held not to be exempt in the *Determination* case. The United States intervened in general support of the Commission's order in the *Determination* case, but admitted that the Commission's rules respecting particular commodities were a mistaken interpretation of the agricultural exemption. These Appellant Railroads and interested motor carriers and associations of motor carriers intervened in support of the Commission. This matter, with the same caption as the companion case was docketed by the Court below as Civil Action No. 8285.

Briefs were filed by all interested parties below and the cases were argued orally together.

In an opinion handed down January 26, 1955, the Court below unanimously held that the *Determination* case was not reviewable because the proceeding was not an adversary one and "purported to do no more than direct that an investigation be made into the meaning of the statutory language. Notice was only given to the public." The Court below took the position that the holding of this Court in *United States v. Los Angeles R. Co.*, 273 U. S. 299 (1927) was authority for its ruling. The complaint seeking the review of the *Determination* case was, therefore, dismissed.

The Court below also unanimously held in Civil Action 8396 that the Commission should be enjoined from enforcing its order against Frozen Food Express insofar as fresh and frozen dressed poultry was concerned.[3] Thus the Court

3. Judge Kennerly, in a separate opinion, also expressed the view that the Commission should be enjoined from enforcing its cease and desist order against Frozen Food Express insofar as fresh and frozen

below reviewed the *Enforcement* case but declined to review the *Determination* case, although the two cases involved the same provisions of the Interstate Commerce Act and the same questions of statutory construction, and further, the Commission's decision in the *Enforcement* case was based entirely upon the rules earlier formulated in the *Determination* case.

E. The Proceedings Before This Court

The actions in the Court below which grew out of the litigation before the Commission are before this Court in the several related appeals. This Court, as indicated before, has noted probable jurisdiction by an order dated October 10, 1955. In summary, there are two principal questions presented:

1. Whether the Commission's order in the *Determination* case is reviewable; and

2. Whether the Court below erred in holding that the Commission had improperly attempted to enforce its ruling made in the *Determination* case to the effect that fresh or frozen dressed poultry are not agricultural commodities as that term is used in section 203(b)(6) of the Interstate Commerce Act, by issuing the cease and desist order against Frozen Food Express.

While these questions are the cardinal ones and extremely important, still another question arises should this Court find—as these Appellant Railroads contend that it should—that the order of the Commission in the *Determination* case is reviewable. That question is the extent to

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meats were concerned. The majority of the Court was of the other view and held that the Commission's rules holding that fresh and frozen meats were non-exempt, were proper. This ruling of the Court below on fresh and frozen meat is not before this Court except as all of the Commission's rules in the *Determination* case may be held reviewable.

which this Court should announce principles governing any subsequent review of the *Determination* case on the merits.

F. Other Litigation Involved in the Instant Litigation Before This Court

The problem of interpreting the agricultural exemption has not been singular to the *Determination* case and the *Enforcement* case which are of direct concern in the litigation now before this Court. Rather, the problem of interpreting the agricultural exemption has been a matter of concern to several federal Courts and to the Commission in several cases both prior, and subsequent, to the *Determination* case. And, as pointed out by these Appellant Railroads in their initial pleadings before this Court, the results of the several court decisions involving this section of the Act have neither established a pattern of uniformity or a trend of decisions that is likely to result in the elimination of the confusion and uncertainty that has existed since the passage of the Motor Carrier Act of 1935. If anything, the decisions of the courts have tended to extend and widen the confusion that already exists.

A review of the cases indicates that the rulings of the Commission in the *Determination* case have been supported or confirmed by the decisions of the Courts in *I. C. C. v. Weldon*, 90 F. Supp. 873 (W. D. Tenn. 1950), aff'd, 188 F. 2d 367 (6th Cir. 1951), cert. denied, 342 U. S. 827 (1951); *Southwest Trading Company v. United States*, 208 F. 2d 708 (5th Cir. 1953) and by the Court below with respect to fresh and frozen meats. The Commission itself has followed its rulings in the *Determination* case, in *East Texas Motor Freight Lines v. Frozen Food Express*, 62 M. C. C. 646 (1954); *W. C. McClintock Common Carrier Application*, Docket MC-113629 (Sub No. 1) (I. C. C. November, 1954); *Alexander Kroblin Inc. Extension—Dairy Products*, Docket MC-70252 (Sub No. 5) (I. C. C. April, 1955); *Penn Dixie Lines, Inc. Extension—Rice*, Docket No. MC-110190

(Sub No. 19) (I. C. C. November 21, 1955) and *Marino Trucking Co., Inc.—Extension—Peel*, Docket No. MC-84805 (Sub No. 2) (I. C. C. December, 1955).

In other cases the Commission's rulings in the *Determination* case have been held improper by the Courts, *I. C. C. v. Yeary Transfer Co.*, 104 F. Supp. 245 (E. D. Ky. 1952) aff'd, 202 F. 2d 151 (6th Cir. 1953); *I. C. C. v. Allen E. Kroblin, supra.*

It is the belief of these Appellant Railroads that the instant litigation before this Court provides a most acceptable vehicle for a ruling by this Court that will either bring an end to the confusion that now exists, or provide a basis for future determinations by the Commission and the Courts that will promote clarity and certainty.

VI
SUMMARY OF ARGUMENT

The Court below erred in holding that the *Determination* case was not reviewable, for under the principles announced by this Court in such important cases as: *Assigned Car Cases*, 274 U. S. 564 (1927); *Morgan v. United States*, 298 U. S. 468 (1936); and *American Trucking Associations Inc. v. United States*, 344 U. S. 298 (1953), the Interstate Commerce Commission, in the *Determination* case was exercising its quasi-legislative function by filling in the details of section 203(b)(6) of the Interstate Commerce Act so that the broad language utilized by Congress would be given a readily understood meaning and everyday workability.

It is well established that where the Commission has exercised its quasi-legislative function, such action is reviewable on the merits by a federal three-judge statutory court. Section 10 of the Administrative Procedure Act; *American Trucking Associations, Inc. v. U. S., supra.* See also, *Assigned Car Cases, supra* at 583; *Columbia Broadcasting System v. United States*, 316 U. S. 407, 417 (1942).

Reliance by the Court below upon *United States v. Los Angeles R. Co.*, 273 U. S. 299 (1927) as authority for its judgment that the Commission's rulings in the *Determination* case were not reviewable was improper, because the *Los Angeles R.* case did not involve quasi-legislative action of the Commission, but rather a Commission investigation into the value of a single rail carrier, the results of which were not formalized by an order requiring such carrier to either undertake or refrain from specified action.

Since the *Determination* case involved an exercise of the quasi-legislative function of the Commission, this Court should reverse the judgment of the Court below and order it to review the *Determination* case on the merits. In so doing, these Appellant Railroads most respectfully urge, that this Court announce principles of law to guide the Court below in making the review so that the uncertainty and confusion that exists in the several federal court decisions respecting the interpretation of the agricultural exemption (Section 203(b)(6) of the Interstate Commerce Act) may be eliminated.

Specifically, these Appellant Railroads urge this Court to reaffirm the principles of statutory construction announced unequivocally by it in such cases as: *Piedmont & N. Ry. Co. v. I. C. C.*, 286 U. S. 299 (1932); *McDonald v. Thompson*, 305 U. S. 263 (1938); *Gregg Cartage Co. v. United States*, 316 U. S. 74 (1942); and *Crescent Express Lines v. United States*, 320 U. S. 401 (1943). In those cases this Court has declared that because of the great scope and complexities of the Interstate Commerce Act, which provides a comprehensive scheme for regulating all types of surface for-hire interstate transportation, that all exemptions from regulation should be strictly or narrowly construed.

Because the agricultural exemption is contained in a long list of other exemptions from economic regulation; because Congress has nowhere indicated in the Act that the agricultural exemption should be given different inter-

pretation than other exemptions; and because the agricultural exemption, unless narrowly or strictly construed will frustrate the objectives of Congress in enacting the Motor Carrier Act; this Court should make it clear that the agricultural exemption, like all other exemptions in the Interstate Commerce Act should be strictly or narrowly construed.

These Appellant Railroads most respectfully submit that this Court should also reverse the judgment of the Court below which held—contrary to the ruling of the Interstate Commerce Commission—that the transportation of fresh or frozen dressed poultry was exempt from the economic regulatory powers of the Commission and that, therefore, the order of the Commission requiring Frozen Food Express Inc. to cease and desist from hauling such commodities in interstate commerce without a certificate or permit duly issued by the Commission should be enjoined and restrained. In effect, these Appellant Railroads are asking this Court to restore the order of the Commission requiring Frozen Food Express to cease and desist from hauling fresh or frozen dressed poultry in interstate commerce until the carrier secures a certificate or permit from the Commission. The basis for this position of the Appellant Railroads is that the Court below improperly held in reliance upon *I. C. C. v. Allen E. Kroblin*, 113 F. Supp. 599 (N. D. Iowa 1953) that the agricultural exemption should be liberally construed in favor of the exempt status whereas, as indicated before, this Court has made it clear that exemptions from regulation contained in the Interstate Commerce Act should be narrowly or strictly construed.

It is the position of these Appellant Railroads that had the Court below followed the pronouncements of this Court respecting the principles of statutory construction to be used in interpreting exemptions from regulation contained in the Interstate Commerce Act, that Court upon giving proper weight to the rulings of the Commission respecting

the status of fresh or frozen dressed poultry would have concluded that such commodities were not in the exempt category, but rather when transported in for-hire carriage must move in vehicles of carriers having certificates or permits issued by the Commission.

In summary, upon the bases of these contentions and the arguments more fully developed in the section of this Brief entitled "Argument", these Appellant Railroads most respectfully ask this Court to reverse the judgment of the Court below holding that the *Determination* case was not reviewable. Further, these Appellant Railroads most respectfully urge that the judgment of the Court below respecting the status of fresh or frozen dressed poultry should also be reversed.

VII
ARGUMENT

A. The Court Below Erred in Holding That the Commission's Rulings in the Determination Case Were Not Subject to Judicial Review

1. The Actions by the Commission in the Determination Case Constituted an Exercise of the Commission's Quasi-Legislative Function

The Court below, in dismissing the complaint insofar as it asked the Court to review the *Determination* case (Civil Action 8285), said at page 7 (R. 108, Nos. 158-161):

> "We are of the opinion that the action may not be maintained, and must be dismissed, for the reason that the report and order of the Interstate Commerce Commission of April 13, 1951, is not an 'order' subject to judicial review under any of the other statutes cited. The proceeding before the Commission was not an adversary one. The order which initiated it purported to do no more than direct that an investigation be made of the meaning of the statutory language. Notice was given only to the public. When the final report and order was forthcoming some two years later, the only 'order' entered was one discontinuing the proceeding and removing it from the Commission's docket."

The Court below then cited as authority for its holding that the order was not reviewable, *United States v. Los Angeles R. Co.*, 273 U.S. 299 (1927).

It is apparent that the Court below, in ruling as it did, failed adequately to distinguish between two principal functions of most of the federal administrative agencies. Had the investigation by the Commission been concerned with

the activities of a single carrier with the object in mind of issuing a cease and desist order against such carrier, the observations of the Court below might well have been applicable and the opinion of this Court in *United States v. Los Angeles R. Co., supra,* probably controlling.

Under such circumstances the Commission would have been exercising its quasi-judicial function or, in the terms of the Administrative Procedure Act, making an adjudication. In proceedings where an administrative agency is attempting within its jurisdictional field to apply the law to a particular subject of regulation by compelling such subject either to do something which the law requires, or to refrain from doing something prohibited by law, the agency is engaging in a role which the courts traditionally have exercised. This being so, such proceedings must, by the established precedents and by the requirements of the Administrative Procedure Act, meet the standards of procedural due process of law. That is, there should be notice to the individual defendants, full adversary proceedings including the right to present testimony and to cross-examine witnesses, and a definitive order issued either for or against the defendant. Stated a little differently, the administrative proceedings partake of the essential nature of judicial proceedings and must provide the safeguards that are deemed all important in the American system of individual justice. See *e.g. Assigned Car Cases,* 274 U. S. 564, 583 (1927); *Pennsylvania Railroad Company v. New Jersey State Aviation Commission, et al.,* 2 N. J. 64, 65 A. 2d 61, 63 (1949); See also sections 5, 7 and 8 of the Administrative Procedure Act.

Where the administrative agency is dealing with a matter that permits of an adjudication, but for one reason or another, the agency either does not provide the requisite procedural safeguards, or does not finalize its findings by an order directing the defendant subject of regulation to either do something or refrain from doing something, the agency's action does not constitute an adjudication and is

not, therefore, reviewable on the merits. Were the agency to attempt to enforce its findings, the person affected thereby could appeal to the courts to restrain such an attempt because in legal contemplation the findings of the agency would be a nullity. Such findings would amount to nothing more than an administrative conclusion which the agency desired to make known to a business subject to its regulation as a possible guide to it in its everyday affairs. That is precisely what this Court held in *United States v. Los Angeles R. Co.*, 273 U. S. 299 (1927). There, the Commission conducted an investigation to fix the value of a single railroad. The results of this investigation, while made known in a Commission report, were not reduced to an order compelling the rail carrier to utilize the valuation in any particular manner. An attempt was made to review the Commission's findings. This Court in holding that review on the merits was improper in an opinion by Mr. Justice Brandeis said at Page 309:

> "The so-called order here assailed differs essentially from all those held by this Court to be subject to judicial review under any of those Acts. Each of the orders so reviewed was an exercise either of the quasi-judicial function of determining controversies or of the delegated legislative function of rate making and rule making."

This Court then went on and pointed out that the so-called order was: (Pages 310-311)

> "* * * the exercise solely of the function of investigation [and that it was] at least possible that no proceeding will ever be instituted, either before the Commission or a court, in which the matters now complained of will be involved or in which the errors alleged will be of legal significance."

If the Commission in the *Determination* case had had before it the question of the applicability of the agricultural

exemption to a single carrier's particular operation, the observations of the Court below respecting the procedures utilized, and its reliance upon the *Los Angeles Railroad* case might have been appropriate because the *Determination* case was not concluded by an order requiring any designated carrier to undertake, or refrain from, specified action. But the Commission was dealing with a vastly different situation in the *Determination* case, and it is this feature that makes the observations of the Court below completely inappropriate and the *Los Angeles Railroad* case non-controlling.

The function of administrative agencies is not limited to the making of adjudications. By the very nature of the broad economic areas in which they operate, it is necessary that the agencies be given power to fill in the details and implement the Congressional policies outlined in the basic legislation establishing the agencies. Particularly is this true in the case of the Interstate Commerce Commission to which Congress has entrusted the responsibility of overseeing and regulating the affairs of the nation's gigantic transportation system. In fact, this Court itself has recognized this function by saying, in reference to provisions of the Interstate Commerce Act:

> ". . . But all legislation dealing with this problem since the first Act in 1887, 24 Stat. 379, has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and fair national transportation system." *United States v. Pennsylvania R. Co.*, 323 U. S. 612, 616 (1945).

A component of this quasi-legislative function of implementing Acts of Congress is the administrative agencies'

rule making power [4] which has, on numerous occasions, been upheld by this Court both as to agencies in general and the Commission in particular.[5]

Essentially, the quasi-legislative function of administrative agencies is a delegation of legislative power circumscribed by limitations which Congress establishes to prevent the agency from usurping or improperly exercising rights vested solely in the Congress by the Constitution. It is a limited power given by Congress in this instance to the Commission to prescribe standards of conduct to govern the future actions of a substantial portion of the carriers subject to regulation.

Where the quasi-legislative function is being exercised, it is apparent that the procedural standards to be met must of necessity differ considerably from those in adjudications. Since the rules to be prescribed by the agency will affect many persons, it follows that individual notice is not as appropriate as notice to the general public. Further, it appears that since the rules to be prescribed have general applicability the concern is not so much with the individual, but rather with the group. Adversary proceedings are poorly adapted to establish the requirements of a group. Finally, the rules governing future conduct, are not directed to any particular individual, but rather, like a statute, apply to no one in particular but to everyone in general. Having these basic thoughts in mind it cannot be gainsaid that if the Commission in the *Determination* case was in fact exercising its quasi-legislative function that the observation of the Court below respecting the Commission's procedures was wholly inappropriate because the type of proceedings utilized by the Commission were particularly well suited to the exercise of that function.

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4. See the famous leading case: *Morgan v. United States*, 298 U. S. 468 (1936), 304 U. S. 1 (1937), 307 U. S. 183 (1939), 313 U. S. 409 (1941); and Sections 2(c) and 4 of the Administrative Procedure Act.

5. See e.g. *American Trucking Associations Inc. v. United States*, 344 U. S. 298 (1953).

The question thus resolves itself into a simple inquiry as to whether or not the Commission was exercising its quasi-legislative function or rule making power in the *Determination* case. Section 2(c) of the Administrative Procedure Act, defining rule making, states:

> "'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy * * * and includes the approval or prescription for the future of * * * services * * * or practices bearing upon any of the foreging [i.e. including services]. 'Rule making' means agency process for the formulation, amendment, or repeal of a rule."

From this section of the Administrative Procedure Act, it seems clear beyond all doubt that "rule making" includes the making of rules interpreting the statutory language under which the regulatory processes of the Commission are to be carried out. In the *Determination* case, the Commission was confronted with a situation where the language of the agricultural exemption was not self-explanatory and where, as explained by the Commission, there was considerable agitation for authoritative interpretation by the Commission that would eliminate confusion and doubt. So it can be said that the situation was one that called for the exercise of the rule making power.

The Commission, responsive to the situation, instituted and carried on the *Determination* case. It would be well to place the proceedings alongside the requirements of section 4 of the Administrative Procedure Act to see whether it constituted rule making.

Section 4 provides in Paragraph (a) that general notice of the proposed rule making be published in the Federal Register unless all interested persons have actual notice. It appears in this instance that notice was filed in the Federal Register, and that all interested persons had ac-

tual notice, either by reason of the publication of the Commission's order instituting the proceeding in various trade journals or through the innumerable carrier associations that regularly advise their members of matters of interest to them. The Court below states that notice to the general public was given and it is important to note in passing that no one has complained of the inadequacy of notice. Further, it appears that since the Commission was concerned with the interpretation of the statute that the provisions of section 4(a) of the Act were not strictly applicable.

After the institution of the proceeding, the procedure followed by the Commission conformed to, and from the standpoint of due process more than satisfied the requirements of Paragraphs (b), (c) and (d) of section 4 of the Administrative Procedure Act. Those paragraphs require merely that the agency (1) give all interested parties an opportunity to be heard either orally or in writing, (2) consider all of the relevant matters submitted, (3) prescribe the rules, accompanying such rules by the reason for their prescription, and (4) give interested parties an opportunity to petition for modification of the rules. The Commission not only gave every interested party the right to present his views, but also held full scale hearings which included an Examiner's recommended report, exceptions, oral argument before the Commission, and finally, a complete report and order of the Commission. Since the hearings more than satisfied the requirements of section 4, the report and order of the Commission itself, together with the situation to which the report was addressed, determines, in the final analysis, the nature of the Commission's action.

The report and order in the *Determination* case in every way points to the almost irrefutable conclusion that the Commission was engaged in rule making. First of all the Commission points out that the issue is to determine the meaning of the agricultural exemption (R. 38, Nos. 158-161), quite obviously for the future. The Commission then

describes the various interpretations possible and concludes that the term "agricultural commodities" embraces:

> "All products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, nuts), forest products, live poultry and bees; and commodities produced by ordinary live stock, live poultry and bees (such as milk, wool, eggs and honey)" (R. 41, Nos. 158-161).

Having interpreted the term "agricultural commodities" as used in section 203(b)(6), the Commission then turned to the interpretation of the words: "not including manufactured products thereof". With respect to these words the Commission said:

> "* * * we conclude that the portion of the term '(not including manufactured products thereof)' means agricultural commodities in their natural state and those which, as a result of treatment or processing, have not acquired new forms, qualities, properties, or combinations." (R. 44, Nos. 158-161).

The Commission having made these interpretations of the language of the agricultural exemption, went further and, by application of these principles and tests, classified a large number of specific agricultural articles as being either exempt or non-exempt. Both the interpretations and the classifications made by the Commission were made the subject of specific findings (R. 89, Nos. 158-161).

It would seem that in this instance the Commission had done for Congress something which Congress itself could have done, namely filled in the details which give meaning and substance to section 203(b)(6).

Having made final determinations of future applicability, the Commission quite properly discontinued the investigation and brought the proceedings to an end.

If there is any doubt remaining that the Commission was prescribing rules governing future action of the carriers, the last vestige is removed by the Commission's subsequent action relying on these rules to determine and prevent violations of section 203(b)(6). This action included the Commission's cease and desist order against Frozen Food Express prohibiting it to haul, without certification, commodities in the non-exempt category, and the refusal to issue certificates to other carriers for the transportation of commodities in the exempt category. Every criterion that can be pointed to indicates that the Commission in the *Determination* case had prescribed interpretative rules and that, by its actions subsequent to the *Determination* case, attempted to make these rules effective.

But it might be contended by some that nowhere in the *Determination* case or elsewhere does the Commission say that it was engaging in rule making or prescribing interpretative rules and that, therefore, the arguments that the Commission was so engaged are not persuasive. The short answer to such contentions is that, in ascertaining the legal consequences that follow events, things are judged by what they are and not what they are said to be. See *Columbia Broadcasting System v. United States*, 316 U. S. 407, (1942) where Mr. Chief Justice Stone said at page 416, in holding that certain actions of the Federal Communications Commission constituted an exercise of its quasi-legislative function and, therefore, were reviewable although that commission had not formally so characterized its action:

> "The particular label placed upon it [i.e. the Commission's action] is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."

2. SINCE THE COMMISSION IN THE DETERMINATION CASE WAS ENGAGED IN RULE MAKING ITS ORDER CLASSIFYING SEVERAL COMMODITIES AS EITHER EXEMPT OR NON-EXEMPT IS SUBJECT TO JUDICIAL REVIEW

Once it is concluded that the Commission was engaged in rule making in the *Determination* case, it follows that the order prescribing the rules is subject to judicial review. The Administrative Procedure Act in section 10 establishes this. And were this not so, the cases decided by this Court would amply demonstrate that rule making by the Interstate Commerce Commission is subject to judicial review. *American Trucking Associations, Inc. v. United States*, 344 U. S. 298 (1953); *Assigned Car Cases*, 274 U. S. 564 (1927); and see *United States v. Los Angeles R. Co.*, 273 U. S. 299, 309 (1927). Perhaps of some significance is the fact that the rulings of the Commission in the *Determination* case have already been reviewed by another Federal District Court, *I. C. C. v. Allen E. Kroblin*, 113 F. Supp. 599, 616 (N. D. Iowa 1953).

A case that is particularly illuminating on the reviewability of administrative agencies' quasi-legislative actions is *Columbia Broadcasting System v. United States, supra.* There, this Court, in holding rule making of the Federal Communications Commission to be reviewable, referred to the established principle that rule making of the Interstate Commerce Commission had uniformly been held to be reviewable. At page 417 the Court said:

> "Such regulations which affect or determine rights generally, even though not directed to any particular person or corporation, when lawfully promulgated by the Interstate Commerce Commission, have the force of law and are orders reviewable under the Urgent Deficiencies Act."

The bench marks in the field of administrative law, such cases as *Morgan v. United States, supra, Assigned*

Car Cases, supra, and recent important cases involving the reviewability of quasi-legislative orders of administrative agencies such as *American Trucking Associations, Inc. v. United States, supra,* and *Columbia Broadcasting System v. United States, supra,* make it clear that what the Commission did in the *Determination* case was to exercise its rule making power by interpreting the agricultural exemption and classifying a large group of commodities as either exempt or non-exempt. Such action by the Commission has been uniformly held to be subject to review by this Court. Where the Court below fell into mistake, these appellant Railroads most respectfully believe, was in applying standards applicable to adjudications to Commission action which was of an entirely different character. Had the action of the Commission been other than quasi-legislative, there might have been some basis for contending that a review on the merits would be improper. But where, as here, the action was quasi-legislative and the type of proceedings more than satisfied the standards of the Administrative Procedure Act, it follows that the Court below should have reviewed the *Determination* case on the merits.

B. The Appellants' Suggestions as to the Action This Court Should Take Upon Finding That the Commission's Rulings in the Determination Case Are Reviewable

Assuming that this Court concludes, contrary to the Court below, that the rulings of the Commission are reviewable, the question arises as to what this Court should do respecting the review on the merits. Examination of section 10 of the Administrative Procedure Act indicates that the scope of review insofar as the involved quasi-legislative action is concerned is limited to two inquiries. The first is whether the Commission's rulings are "arbitrary, capricious or an abuse of discretion" and the second is whether the rulings are "in excess of statutory jurisdiction, authority or limitations or short of statutory right". The

other of the six bases for Court review of the decisions of administrative agencies contained in section 10 are either applicable solely to adjudications, viz., paragraphs (5) and (6), or inapplicable because of the circumstances here involved, viz., (2) and (4), which present no constitutional question or, as explained before, no procedural short comings.

Quite obviously it is the function of the three judge Court below to review on the merits in the first instance actions of the Interstate Commerce Commission which are deemed by this Court to be reviewable, so it would appear that this Court could fulfill its judicial responsibilities by simply returning the matter to the Court below for review to determine whether the Commission's rulings are either arbitrary, capricious or an abuse of discretion, or in excess of statutory jurisdiction, authority, or limitation or short of statutory right.

But, as these Appellant Railroads have pointed out in their jurisdictional statement and in other pleadings filed in this litigation, such an order by this Court will not solve the vexing problems that have confronted the courts in interpreting the agricultural exemption. Moreover, it appears that such an order, standing alone, would stimulate and invite further litigation rather than eliminating litigation which in this situation is most important.

Without repeating at length the arguments already made, these Appellant Railroads believe that the source of the trouble in interpreting the agricultural exemption centers around the principles of statutory construction which are to be utilized. Briefly, the question is whether the words of section 203(b)(6) should be given a narrow interpretation, that is strictly construed against exemption; or a broad interpretation, extending to the utmost the exemption from regulation.

The Commission in the *Determination* case was undoubtedly influenced in classifying commodities as non-

exempt by the rule of statutory construction announced by this Court in such cases as *Piedmont & N. Ry. Co. v. I. C. C.*, 286 U. S. 299 (1932); *McDonald v. Thompson*, 305 U. S. 263 (1938); *Gregg Cartage Co. v. United States*, 316 U. S. 74 (1942); and *Crescent Express Lines v. United States*, 320 U. S. 401 (1943). That rule is to the effect that because of the great scope and complexity of the regulatory scheme of the Interstate Commerce Act, which is remedial legislation, and because of the expanding powers that have been vested in the Commission, all exemptions from regulation should be strictly construed to prevent the watering down and erosion of it. Where the courts have reached decisions both before and after the *Determination* case which are contrary to and opposed to the Commission's rulings, such decisions have been prompted by the belief that the agricultural exemption, unlike other exemptions contained in the Interstate Commerce Act, should be construed in favor of the exempt status. *I. C. C. v. Kroblin, supra,* and *I. C. C. v. Yeary, supra.* This is brought out by the language of the Court in the *Kroblin* case. There, in disapproving of the Commission's ruling respecting fresh dressed poultry, the Court said at page 630 (113 F. Supp. 596):

> "The construction or interpretation of Section 203(b)(6) contended for by the Interstate Commerce Commission would be highly restrictive of the scope of Section 203(b)(6) so far as poultry is concerned."

Where the Commission's rulings respecting particular commodities have been sustained by the Courts, there has been approval of the Commission's strict construction of the exemption, e.g., *I. C. C. v. Weldon*, 90 F. Supp. 873 (W. D. Tenn. 1950), aff'd 188 F. 2d 367 (6th Cir. 1951), cert. denied, 342 U. S. 827 (1951); *Southwest Trading Company v. United States*, 208 F. 2d 708 (5th Cir. 1953).

The Court below, in enjoining the Commission's efforts to make effective its ruling made in the *Determination*

case respecting fresh or frozen dressed poultry, did so entirely upon the reasoning used by the Court in the *Kroblin* case. At Page 12 of its opinion (R. 57, Nos. 162-164) the Court below said:

> "Most able and exhaustive treatment is given the question now before us, insofar as it concerns dressed poultry by Judge Gavin of the United States District Court for the Northern District of Iowa, in I. C. C. v. Kroblin, * * * it is sufficient to state that we agree with those conclusions as to fresh and frozen dressed poultry."

From this statement it is evident that the Court below is of the view that at least with respect to border line commodities their falling into the exempt or the non-exempt status depends almost entirely upon whether section 203(b)(6) is given a strict or narrow construction. And seemingly the Court below as of this time is of the view that the liberal construction of the agricultural exemption is proper.

The primary purpose of this litigation is to determine the proper construction of the agricultural exemption. This can be done, whether the judgments below be affirmed or reversed, if this Court will state the rules of statutory construction to be followed in construing the exemption. This the Court may properly do, for the Commission's order in the *Enforcement* case is unquestionably reviewable and a statement of the principles to be followed in construing the agricultural exemption would normally be included in an opinion in which the validity of such an order is in issue. Of course if the order in the *Determination* case is reviewable, as these Appellants respectfully insist, a statement of the principles to be followed in construing the exemption is essential for the guidance of the Court below.

If this Court should affirm or reverse the judgment below without stating the rules of statutory construction to be followed in construing the agricultural exemption,

the present litigation will have been largely in vain, and the lower courts, the Commission, and the transportation industry will still be in the dark as to the proper construction of the exemption. The confusion and uncertainty now existing will continue and will result in much needless and expensive litigation.

C. This Court in Holding the Determination Case Reviewable and in Reviewing the Holding of the Court Below Respecting Fresh or Frozen Dressed Poultry Should, These Appellants Submit, Make It Clear That the Agricultural Exemption Should Be Strictly or Narrowly Construed

As pointed out in the previous section of this argument, the Court below, in reversing the Commission's ruling respecting fresh or frozen dressed poultry, did so upon the reasoning of the Court in the *Kroblin* case. There, the Court held that the Commission narrowly construed the exemption whereas this particular exemption, as contrasted with others in the Act, should be broadly or liberally construed in favor of the exempt status. The Court below in following the *Kroblin* case, these Appellant Railroads believe, lost sight of the well established doctrine announced by this Court on several occasions to the effect that exemptions from regulation in the Interstate Commerce Act should be strictly construed.

The issue is thus squarely presented as to whether there is something about the agricultural exemption that distinguishes it from other exemptions in the Act, for otherwise it should be governed by the same rules of statutory construction.

It might be argued that the rule of strictly construing exemptions so clearly pronounced by this Court in the *Piedmont* case having been formulated prior to the passage of the Motor Carrier Act of 1935 (now Part II of the Interstate Commerce Act), has applicability only to exemptions contained in Part I of the Act. Not only has this

Court reaffirmed this principle of narrow construction in later cases dealing with Part II of the Interstate Commerce Act such as *McDonald v. Thompson*, 305 U. S. 263 (1938); *Gregg Cartage Co. v. United States*, 316 U. S. 74 (1942); and *Crescent Express Lines v. United States*, 320 U. S. 401 (1943), but it has taken pains to emphasize that the unity of purpose and necessary integration of the various parts of the Act call for uniform administration:

> "The 1940 Transportation Act is divided into three parts, the first relating to railroads, the second to motor vehicles, and the third to water carriers. That Act, as had each previous amendment of the original 1887 Act, expanded the scope of regulation in this field and correlatively broadened the Commission's powers. The interrelationship of the three parts of the Act was made manifest by its declaration of a 'national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each.' The declared objective was that of 'developing, coordinating, and preserving a national transportation system by water, highway, and rail, . . . adequate to meet the needs of the commerce of the United States . . . .' Congress further admonished that 'all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.'" *United States v. Pennsylvania R. Co.*, 323 U. S. 612, 616-617 (1945).

This being so it would appear that, in the absence of very strong and compelling reasons for the application of a different principle respecting section 203(b)(6) of the Act, this section should be interpreted according to the pattern that applies elsewhere throughout the Act.

Examination of the section here involved in relation to other sections of the Act indicates that there is no basis for

distinguishing it. Rather, the indication is directly to the contrary and strongly supports the view that the standard principle of interpretation is called for.

The agricultural exemption is not set apart as something special or unique but is contained in a long list of exemptions each of which, if broadly construed, would tend to limit greatly the powers of the Commission and the areas in which the Commission is to operate. For example, in section 203(b)(7a), the transportation of persons or property when incidental to transportation by aircraft is exempt. A liberal construction of this exemption, in view of the constant expansion of air transport, would have the effect of nullifying almost entirely the Commission's regulatory powers over a considerable portion of the nation's interstate for-hire transportation over the highways. The same thing could be said of section 203 (b)(9) which exempts casual, occasional, or reciprocal transportation of passengers or property. A liberal interpretation of that section would make it impossible for the Commission to regulate all types of irregular motor carrier operations which today encompass one of the largest areas of the Commission's jurisdiction.

From the very position of the agricultural exemption in a long list of exemptions, it is evident that Congress did not intend that this particular exemption be given a different interpr ation from the other exemptions in either section 203(b) or elsewhere in the Act. This, together with the fact that Congress has never seen fit to change the principles announced by this Court for interpreting any exemptions in the Act is convincing evidence that Congress did not intend that the agricultural exemption should be treated differently from the other exemptions throughout the Act.

When the over-all objectives of Congress in enacting the Motor Carrier Act of 1935 are considered, it can scarcely be believed that Congress intended that a liberal interpretation should be given to the agricultural exemption. At the

time of, and for several years prior to, the coming of regulation for interstate motor carriers, the situation was one where ease of entry into the field by anyone owning a motor truck had created great instability and wide spread discriminatory practices. These circumstances were not only jeopardizing the investments of the for-hire truckers, but were also endangering the nation's railroads, the only regulated type of interstate for-hire transportation at that time. Shippers were being affected by the spread of discriminatory practices that threatened existing rate structures, rate relationships and rate groupings. To correct this rapidly deteriorating state of affairs, Congress decided to bring the motor carriers under regulation similar in many ways to that under which the railroads were operating. The purposes of the Motor Carrier Act are best summarized perhaps by the late Commissioner Eastman. He said:

> "The most important thing, I think, is the prevention of an oversupply of transportation; in other words, an oversupply which will sap and weaken the transportation system rather than strengthening it * * * Another objective is to prevent wasteful and destructive competition, the sort of thing that has been referred to as 'rate wars' * * * Another objective is to compel equal treatment of shippers and to prohibit unjust discrimination, compel adherence to published and known dependable rates * * * Another purpose is to require adequate financial responsibility on the part of these carriers."[6]

The foundation upon which the entire scheme of regulation contained in the Motor Carrier Act is built are the sections which require carriers to secure either a certificate or a permit from the Commission before engaging in for-

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6. Hearings on Senate Bill 1629, Senate Committee on Interstate and Foreign Commerce 74th Congress, 1st Session; See also Regulation of Transportation Agencies, S. Doc. 152, 73rd Congress, 2d Sess., 14-15, 22-35, 226, 79 Cong. Rec. 12196, 12209.

hire operations. See *American Trucking Associations Inc. v. United States, supra,* at page 312.[7] Where, however, for-hire interstate transportation is covered by the exemption in section 203(b), the Commission is totally without power to control the entry of new carriers into the field, to regulate rates, or to deal effectively with unsound competitive conditions. In areas where exemption exists the broad objectives of Congress cannot be implemented by the Commission. This, it seems to the Appellant Railroads, is the most compelling reason why the exemption contained in section 203(b)(6) must be strictly construed. This Court has already indicated that where the over all objectives of the Act are weighed against the benefits that might accrue to some segments of the nation's economy from the agricultural exemption, the over all objectives must prevail. In *American Trucking Associations Inc. v. United States, supra,* Mr. Justice Reed said at page 318:

> "Needless to say, the statute is not designed to allow farm truckers to compete with authorized and certificated motor carriers in the carriage of non-agricultural products or manufactured products for off-the-farm use, merely because they have exemption when carrying only agricultural products. We can therefore find nothing in it which implies protection of agricultural truckers' right to haul other property, even though from an economic standpoint that right is important to protect profit margins. Regulated truckers must also receive protection upon their restricted routes and limited carriage. A balance between these competing factors, carried out in accordance with congressional purpose, does not seem to us unreasonable or invalid."

When it is considered that those supporting a broad interpretation of the agricultural exemption are advocating the complete absence of economic regulation for motor car-

7. See also 79 Cong. Rec. 12207-12211, 12222-12225.

riers which in most instances are exclusively engaged in for-hire carrier operations over long interstate distances in direct competition with both the certificated motor carriers and the railroads and which, except in rare instances, are completely divorced from the agricultural community so far as ownership is concerned, the necessity for strictly construing the agricultural exemption to prevent the erosion of the regulatory scheme becomes clear.

While the legislative history of the agricultural exemption is inconclusive in many respects, it does support the view that the exemption should be narrowly construed. A review of the legislative history discloses that the agricultural exemption was included in the Motor Carrier Act primarily for the benefit of farmers who either hauled their own or their neighbors produce to market and that it was not included to exempt from regulation for-hire carriers regularly engaged in the medium or long haul transportation of processed farm products from non-farm origins, such as processing plants, to the ultimate consumers. 70 Cong. Rec. 12213-12215.

The thinking of the Court in the *Kroblin* case, which the Court below adopted, has, as its basis, a concept which seems completely without merit. In the *Kroblin* case, after extensive review of the history of the agricultural exemption both prior and subsequent to the enactment of the Motor Carrier Act, the Court concluded that, because Congress had not enacted into law amendments that would have further narrowed the exemption, the courts should broadly construe the provisions of the exemption. No theory of logic or reasoning supports this view. The fact that Congress has not seen fit to further narrow the agricultural exemption, if it indicates anything at all, points to the conclusion that Congress believes that the use of the ordinary principle of strict construction results in sufficient tightness so that there is no need for making the exemption more restrictive. The failure of Congress to tighten the agricul-

tural exemption is therefore an affirmance of this Court's policy of strictly construing exemptions. If Congress were dissatisfied with the application of the principle of strict construction to the agricultural exemption it could have, on the several opportunities presented to it, amended section 203(b) to provide that Paragraph (6) should be liberally construed. But Congress has not done so.

In summary, there is no basis for concluding that section 203(b)(6) should, unlike all other exemptions from regulation, be given a broad or liberal construction. Rather, the legislative history, the position of this particular exemption in the statute, the over all objectives of the statute, and the applicable cases all strongly support the view that the agricultural exemption should be strictly or narrowly construed. This being so, it is most respectfully submitted that the Court below, in fashioning its holding involving fresh or frozen dressed poultry, did so upon an improper and unsound basis. If, therefore, this Court orders the Court below to review the *Determination* case, it should indicate to that Court that it should follow the principles announced by this Court in the *Piedmont* case, *supra*, and review the Commission's determinations in the light of a strict construction of the agricultural exemption.

D. This Court Should Find That the Ruling of the Court Below Respecting Fresh or Frozen Dressed Poultry Was in Error Both From the Standpoint of the Principles of Statutory Construction Utilized and in Result

The arguments respecting the applicable principles of statutory construction to be used in interpreting the agricultural exemption have been made, and the errors of the Court below respectfully referred to. All that remains is to show that the use of the proper principle would have brought about a different result. Stated a little differently:

If the Court below had, instead of following the *Kroblin* case, strictly construed the agricultural exemption, should it have concluded that fresh or frozen dressed poultry are not, "agricultural commodities!" These Appellant Railroads believe the answer to this question is quite clearly an affirmative one.

The Commission, which had given the matter most exhaustive treatment in the *Determination* case, decided that these commodities were not agricultural products. The Commission is charged with the administration and enforcement of the Act, and its interpretations were entitled to the greatest weight. Unless the Court below believed that the Commission's interpretations were, beyond doubt, arbitrary, senseless, or clearly wrong, they should have been sustained, for the Commission, in making its determination, was using the proper principles for construing the agricultural exemption. See *Levinson v. Spector Motor Service,* 330 U. S. 649, 672 (1947).

Assuming that the test for determining whether a particular item is an aricultural commodity, or a manufactured product thereof is that "as a result of some treatment" the original agricultural commodities "have been so changed as to possess new forms, qualities or properties or result in combinations" it would seem that there is much to be said for the Commission's determination respecting fresh or frozen dressed poultry and very little to be said against it. First, dressed poultry, whether fresh or frozen, is certainly a very different product from the live animals. Second, the processing which brings about the changed form is one that is done off the farm for it is generally carried on in large industrial plants that hire non-farm labor. Third, the processing is generally done by industrial concerns which are not engaged in farming. Fourth, the poultry when frozen takes on physical characteristics which result in a product that is not too different from canned or other preserved poultry, which all parties agree are not agricultural commodities.

Having in mind that other parties in this proceeding will devote considerable time in showing that fresh or frozen dressed poultry should be in the non-exempt category, these Appellant Railroads, in summary, urge that if it be concluded that the strict interpretation of the exemption is proper, the Commission's interpretation respecting these commodities is neither arbitrary, senseless, or inconsistent with the statute. Such interpretation should therefore have been sustained by the Court below. In holding otherwise the Court below was, these Appellant Railroads most respectfully submit, in error.

VIII
CONCLUSION AND REQUEST FOR RELIEF

It is most respectfully submitted for the reasons more fully stated above that this Court should:

1. Reverse the judgment of the Court below holding that the Commission's order in *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (1951), was not reviewable.

2. Order the Court below to review the Commission's order in *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (1951), in accordance with the principles statutory construction announced by this Court in such cases as *Piedmont and N. Ry. Co. v. Interstate Commerce Commission*, 286 U. S. 299 (1932) for construing exemptions from regulation contained in the Interstate Commerce Act.

3. Reverse the judgment of the Court below enjoining and restraining the Commission from enforcing its order in *East Texas Motor Freight Lines Inc. v. Frozen Food Express*, 62 M. C. C. 646 (1954) insofar as the Commission ordered Frozen Food Express to cease and desist from haul-

ing fresh or frozen dressed poultry in interstate commerce until it acquired a certificate or permit issued by the Commission covering the transportation thereof. The effect of this action by this Court will be to restore the Commission's cease and desist order.

Respectfully submitted,

JAMES W. NESBIT,
CHARLES P. REYNOLDS,
CARL HELMETAG, JR.,
1740 Suburban Station Building,
Philadelphia 4, Pa.,
Attorneys for Appellant Railroads.

CERTIFICATE OF SERVICE

I, Carl Helmetag, Jr., attorney for the Appellant Railroads, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Brief of the Appellant Railroads on the several parties to this action as follows:

1. On Frozen Food Express, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, Carl L. Phinney, Esq., and Leroy Hallman, Esq., First National Banking Building, Dallas, Texas.

2. On the Secretary of Agriculture, by mailing copies in duly addressed envelopes with postage prepaid, to his attorneys, Honorable Robert L. Farrington, Honorable Neal Brooks, and Honorable Donald A. Campbell, United States Department of Agriculture, Washington 25, D. C.

3. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes with postage prepaid to its attorney, Honorable Leo H. Pou, Office of the Interstate Commerce Commission, Washington 25, D. C.

4. On the United States of America, by mailing copies in duly addressed envelopes, with postage prepaid, to its attorneys, Honorable Simon E. Sobeloff, the Solicitor General of the United States, Honorable Stanley N. Barnes, Assistant Attorney General, and Honorable Daniel Friedman, Special Assistant to the Attorney General, United States Department of Justice, Washington 25, D. C. and by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its attorney of record, Honorable Malcolm R. Wilkey, United States Attorney, Houston, Texas.

5. On several interested parties, by mailing copies in duly addressed envelopes with postage prepaid to their re-

spective attorneys of record, to wit: David G. MacDonald, Esq. and Francis W. McInerny, Esq., Commonwealth Building, 1625 K Street, N. W., Washington 6, D. C.; Peter T. Beardsley, Esq., and Fritz Kahn, Esq., c/o American Trucking Associations, Inc., 1424 Sixteenth Street, N. W., Washington 6, D. C.; Dale C. Dillon, Esq., and Clarence D. Todd, Esq., 944 Washington Building, Washington 5, D. C., and by mailing copies in duly addressed envelopes, with air mail postage prepaid, to Rollo E. Kidwell, Esq., 301 Empire Bank Building, Dallas, Texas; and Lee Reeder, Esq., 1012 Baltimore Avenue, Kansas City 5, Missouri.

This 4th day of January, 1956.

CARL HELMETAG, JR.

APPENDIX "A"

Sections of the Administrative Procedure Act referred to:

Section 2(c)

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances thereof or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

Section 4

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) NOTICE—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except

where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) PROCEDURES—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) EFFECTIVE DATES—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) PETITIONS—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Section 10

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs or prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken

on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

APPENDIX "B"

LIST OF CLASS I RAILROADS

The below listed Railroads are the individual carriers which, together, are designated as the "Appellant Railroads". When used, the term "Appellant Railroads" includes each of these named railroads:

Akron, Canton and Youngstown Railroad Company
The Ann Arbor Railroad Company
The Atchison, Topeka & Santa Fe Railway Company
Atlantic Coast Line Railroad Company
The Baltimore & Ohio Railroad Company
Bangor and Aroostook Railroad Company
Boston and Maine Railroad
Central of Georgia Railway Company
The Central Railroad Company of New Jersey
Chicago & Illinois Midland Railway Company
Chicago and Northwestern Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago, Great Western Railway Company
Chicago, Indianapolis and Louisville Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
The Delaware and Hudson Railroad
The Delaware, Lackawanna and Western Railroad Company
The Denver and Rio Grande Western Railroad Company
The Detroit and Toledo Shore Line Railroad Company
Detroit, Toledo and Ironton Railroad Company
Duluth, South Shore and Atlantic Railway Company (P. L. Solether, Trustee)

Elgin, Joliet and Eastern Railway Company
Erie Railroad
Florida East Coast Railway Company (John W. Martin, Trustee)
Fort Dodge, Des Moines & Southern Railway Company
Grand Trunk Railway System
Great Northern Railway Company
Green Bay & Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
The Kansas City Southern Railway Company
Lehigh and New England Railroad Company
Lehigh Valley Railroad Company
Maine Central Railroad Company
Midland Valley Railroad Company
The Minneapolis & St. Louis Railway Company
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company (Guy A. Thompson, Trustee)
The Nashville, Chattanooga & St. Louis Railway
New York Central System
The New York, Chicago & St. Louis Railroad Company
The New York, New Haven & Hartford Railroad Company
New York, Ontario and Western Railway
New York, Susquehanna and Western Railroad Company
Norfolk and Western Railway
Northern Pacific Railway Company
The Pennsylvania Railroad Company
The Pittsburgh and West Virginia Railway Company
Reading Company
St. Louis-San Francisco Railway Company
St. Louis Southern Railway Company

Seaboard Air Line Railroad Company
Southern Railway Company
Southern Pacific Company
The Texas and Pacific Railway Company
Toledo, Peoria & Western Railroad
Union Pacific Railroad Company
The Virginian Railway Company
Wabash Railroad Company
Western Maryland Railway
The Western Pacific Railroad Company